

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEANETTE HUNT)	
Claimant)	
VS.)	
)	Docket No. 262,998
AUTOMOTIVE CONTROLS CORPORATION)	
Respondent)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the February 16, 2004 Award Nunc Pro Tunc, modifying the February 10, 2004 Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded permanent partial disability benefits for a 10 percent impairment to the body as a whole, but denied any permanent partial general work disability benefits under K.S.A. 44-510e. The Appeals Board (Board) heard oral argument on August 10, 2004.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Garry W. Lassman of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

What is the nature and extent of claimant's injury and, more particularly, is claimant entitled to a permanent partial general work disability under K.S.A. 44-510e or should she be limited to her functional impairment pursuant to *Foulk*¹ and *Copeland*²?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

Claimant worked for respondent as an assembler in July of 2000, when she began developing problems in her hands, elbows, shoulders, neck and low back. These problems had been in existence before July of 2000, but considerably worsened in July. Claimant advised respondent of her difficulties and was referred to Dr. Mears, who placed her on Prednisone and ordered physical therapy. Claimant advised the physical therapy did not help. She was then sent to Dr. Goldman and, on her own, went to Dr. Chillal, who, on January 4, 2001, took her off work, placing her on restrictions. She was off work for approximately 90 days. At that time, Dr. Chillal determined she was not ready to go back to work and she continued off work through January of 2002. There is no indication in the record that claimant saw Dr. Chillal during this several-month period. She was, however, referred by respondent to other doctors during this period.

Claimant was examined by John M. Veitch, M.D., a board certified orthopedic surgeon, as a result of a referral by the Administrative Law Judge. Dr. Veitch first examined claimant on July 18, 2001. He ordered an MRI of her cervical spine, and EMG and nerve conduction studies. Claimant was diagnosed with bilateral carpal tunnel syndrome and chronic lateral epicondylitis of the elbows, which he determined had been aggravated by claimant's work duties. He diagnosed fibromyalgia in claimant's shoulders and neck, which Dr. Veitch determined was not work related.

The MRI indicated degenerative arthritis in the cervical spine, which Dr. Veitch determined was also not related to her work. He testified that he had never diagnosed a patient with work-related fibromyalgia, although he did acknowledge that fibromyalgia may be aggravated by work-related activities.

¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

² *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Claimant was referred by respondent to Steven L. Hendler, M.D., board certified in physical medicine and rehabilitation. Dr. Hendler saw claimant on two occasions, the first being September 5, 2002, with a follow up on October 10, 2002. Dr. Hendler also referred claimant for EMG studies, diagnosing bilateral ulnar nerve impingement at the elbows and chronic lumbar strain. He assessed claimant a 10 percent impairment to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), and restricted her from performing repetitive activities of the arms, although he acknowledged that the restrictions were primarily due to her rheumatoid arthritis. He described rheumatoid arthritis as being progressive in nature, but acknowledged the etiology had not yet been elucidated. He stated that the etiology of claimant's rheumatoid arthritis was not known, although he acknowledged that it could possibly be accelerated or aggravated by repetitive work activities. He also testified that fibromyalgia is not work related. He disagreed with Dr. Veitch's diagnosis of carpal tunnel syndrome.

Claimant was referred to Pedro A. Murati, M.D., board certified in rehabilitation, at the request of her attorney. Dr. Murati examined claimant on April 8, 2002, diagnosing bilateral carpal tunnel syndrome, myofascial pain syndrome affecting the shoulders and neck, and rheumatoid arthritis. He assessed claimant a 37 percent impairment to the body as a whole. When provided the vocational evaluation prepared by Michael Dreiling, he opined that claimant was unable to do thirteen of fifteen previous tasks, for an 87 percent task loss. He agreed that claimant's rheumatoid arthritis was not work related and acknowledged that certain restrictions he placed upon claimant were due to the arthritis. However, on cross-examination, when asked if he omitted the rheumatoid arthritis, would it change his task loss opinion, he stated no.

Dr. Chillal, claimant's unauthorized, personal treating doctor, kept claimant off work until January of 2002, at which time he returned claimant to work with no restrictions. When claimant returned to respondent's employment, she was advised that respondent was in the process of laying people off and there was no work available. Rather than continuing to look for work, claimant determined that she would retire from respondent's employment and apply for Social Security retirement, which she began receiving on January 17, 2001. Claimant's Social Security retirement was later modified to Social Security disability.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.³

³ K.S.A. 44-501 and K.S.A. 44-508(g).

It is the function of the trier of fact to determine which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁴

In this instance, the ALJ determined that the functional impairment opinion of Dr. Hendler, assessing claimant a 10 percent impairment to the body as a whole, was the most credible and adopted that as the award. The Board, in reviewing the medical evidence, agrees and awards claimant a 10 percent functional impairment to the body as a whole.

Claimant argues entitlement to a permanent partial general work disability under K.S.A. 44-510e. The Board notes the restrictions placed upon claimant by the various health care providers are primarily due to claimant's rheumatoid arthritis as opposed to her work-related injuries. Dr. Murati acknowledged that claimant's rheumatoid arthritis is not work related. Dr. Veitch felt that claimant's cervical spine and shoulder symptoms were not related to her work, but rather related to her rheumatoid arthritis and fibromyalgia. And Dr. Hendler testified that any restrictions he would have placed on claimant would have been primarily due to her rheumatoid arthritis.

As noted above, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. The Board finds a preponderance of the medical evidence in this record supports a finding that claimant's restrictions or limitations stem from the rheumatoid arthritis, which the health care providers have acknowledged is not related to her work-related injuries. Absent restrictions for the work-related injury, there is no work disability. Claimant is, therefore, limited to her functional impairment of 10 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated February 10, 2004, as modified by the Award Nunc Pro Tunc of February 16, 2004, should be, and is hereby, affirmed in all regards.

IT IS SO ORDERED.

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Dated this ____ day of October 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Garry W. Lassman, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director